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# Appeal Decision

Site visit made on 10 June 2021

**by Paul Freer BA (Hons) LLM PhD MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 18 June 2021**

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**Appeal Ref: APP/Y3615/X/20/3253830**

**Oakmead Farm, Ockham Lane, Cobham KT11 1LY**

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (the 1990 Act) as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
  - The appeal is made by Mr Allen against the decision of Guildford Borough Council.
  - The application Ref 20/P/00127, dated 23 January 2020, was refused by notice dated 19 March 2020.
  - The application was made under section [191(1)(a) of the Town and Country Planning Act 1990 as amended.
  - The use for which a certificate of lawful use or development is sought is use of land for ancillary residential purposes to the main dwelling.
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## **Summary Decision: the appeal is dismissed**

### **Application for costs**

1. An application for costs was made by Mr Allen against Guildford Borough Council. This application is the subject of a separate Decision.

### **Procedural matters**

2. The application to which this application relates (Council Ref: 20/P/00127) originally sought a certificate of lawful use for a use described as the existing use of land as residential curtilage. In determining that application, the Council amended the description to use of land for ancillary residential purposes to the main dwelling.
3. The Council was correct to do so. The Courts have held that the concept of curtilage is not a use of land. Neither does the curtilage of a building necessarily equate to the planning unit, although of course on occasions it may do so.
4. I raise that point here because it is necessary to place into proper context the findings of the Inspector in dismissing an earlier appeal against the refusal of the Council to grant a certificate of lawful use or development for the erection of a garage and store on this site (APP/Y3615/X/19/3234548). The appeal failed because, on the balance of probability, the Inspector concluded that the proposal could not be regarded as being incidental to the enjoyment of the dwellinghouse as such and therefore would not constitute permitted development for the purposes of the Town and Country Planning (General Permitted Development) (England) Order 2015.

5. In paragraph 19 of his decision, the Inspector concluded that the development then before him would be erected within the curtilage of the dwellinghouse. For the reasons set out above, the Inspector's conclusion in that respect does not necessarily mean that he found the use of that land to be for residential purposes ancillary to the main dwelling. Moreover, the Inspectors' conclusion in that respect was reached in the context of a site visit made in June 2020 and therefore only relates to the situation at that time. That site visit was made after the application to which this appeal relates was submitted. For these reasons, the Inspector's conclusions have had no bearing on my consideration of this appeal.
6. As part of his evidence for the current appeal, the appellant provided Youtube footage of him training in the garden and a photograph of gardening taking place on the land. I was not able to access the latter image, and could not consider the former because I could not be certain that the Council had been provided with the same evidence.
7. The appellant also indicated in his appeal statement that he would be providing a total of 10 Statutory Declarations to support his position. In the event, only two Statutory Declarations were submitted: one from the appellant himself, and a joint Declaration from Mr Marco Attard and Ms Claire Attard. I am satisfied that both of those Statutory Declarations are properly made before a solicitor and accordingly have afforded them due weight in that regard.
8. The Council points out that the evidence provided in Appendices E to H to the appellant's Appeal Statement was not available to it during consideration of the application. The Council considers that it is not appropriate to provide additional evidence at appeal stage for a Certificate of Lawfulness that had been determined on the evidence available at the time. However, section 195 of the 1990 Act refers to the 'refusal' being well-founded. On my reading, that means the decision of the local planning authority rather than the reasons for that decision. Provided that the Council has had a fair opportunity to comment on that new evidence – which in this case it has – it is incumbent on me to have regard to all the evidence that is before me in determining whether its decision was well-founded.

### **Reasons**

9. Section 191(4) of the 1990 Act indicates that if, on an application under that section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operation or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case shall refuse the application. My decision is therefore based on the facts of the case and judicial authority. For the avoidance of doubt, this means that the planning merits of the proposed development are not relevant to this appeal and the main issue is whether the Council's decision to refuse to grant a Certificate of Lawful Use or Development (LDC) was well founded. In this respect, the burden of proof is on the appellant to show that, on the balance of probability, the development proposed would have been lawful on the date on which the application was made.
10. In order to succeed, the appellant must show on the balance of probability that the land subject to this appeal has been used for residential purposes ancillary

to the main dwelling known as Oakmead Farm continuously for a period of ten years from the date on which the application was made. The relevant date for this purpose is therefore 23 January 2010.

11. The appellant's evidence in support of his appeal is taken from a number of sources, including the aforementioned Statutory Declarations, Land Registry documents, planning applications documents, sales particulars and aerial photographs. It is convenient to consider these in turn albeit not in the sequence presented in the appellant's appeal statement.

#### *Statutory Declarations*

12. The Statutory Declaration provided by the appellant, Mr Anthony Allen, confirms that he has been the owner/occupier of Oakmead Farm since June 2015 and has known the land since April 2015. He goes on to confirm that he has lived at Oakmead Farm continuously since June 2015 and states that the land has been used as a residential garden since that date. Given that Mr Allen has had first-hand knowledge of the use of the appeal site since June 2015, this evidence points strongly to the claimed use having taken place continuously since that time.
13. The joint Statutory Declaration provided by Mr Marco Attard and Ms Claire Attard confirms that they have resided at a property known as Upton Farm, also located on Ockham Lane, since July 2000. It is indicated that their property is adjacent to Oakmead Farm and looks directly onto the appeal site. It is confirmed that this land has formed part of garden of the appellant and the previous owners since 2000 but beyond that is short on detail.
14. Although the joint Statutory Declaration indicates that the property affords views over the appeal site, there is a considerable distance between Upton Farm and the appeal site. Furthermore, although I was not able to view the appeal site from Upton Farm itself, I noted during my site visit to the appeal property that there is some intervening vegetation between the two properties that partially obscures that view. For those reasons, I am not persuaded that the occupiers of Upton Farm were in a good position to be fully aware of the activities taking place on the appeals site during the relevant period, and accordingly attach only limited weight to that evidence.

#### *Planning application documents*

15. The appellant has referred me to a planning application for a shed to provide storage for motor vehicles and workshop together with an access road (Council Ref: 18/P/0157). The appellant explains that the application was accepted by the Council under the category of "Alterations/extensions to a single dwelling house, including works within the curtilage". I have not been provided with a copy of that planning application or the formal decision made by the Council but I understand that planning permission was refused, according to the appellant, because the Council did not consider that the building would be solely for residential use and would therefore constitute a change of use of land. The appellant indicates that this application relates to the same piece of land as that now subject to this appeal and draws the inference from the above that the Council accepts the use of this land as being residential.
16. The Council confirm that the application was accepted as a householder application but dispute the appellant's interpretation of the outcome. The

Council explain that the Officer's Report for this application indicates that the change of use would be to commercial, but without specifying being from residential. Neither the Council nor the appellant have provided a copy of the Officer Report for that application, such that I am not able to verify which version is correct. However, with the burden of proof falling upon the appellant, I have no foundation on which to accept the appellant's version of events.

17. In any event, I am not persuaded that the mere acceptance by the Council of this application as a 'householder application' is evidence that the lawful use of the land is residential. Again, I have not been provided with any details, but it is likely that the Council would have accepted the application on the basis on which it was presented to it. That initial acceptance of the application does not indicate any acceptance on the part of the Council that the lawful use of the land is residential and would not preclude the Council from subsequently reaching the view that the lawful use was not residential.
18. The appellant has provided a copy of the location plan submitted with planning application 99/P/0344 approved, as I understand it, in April 1999 (the 1999 permission). The location plan covers all of the land to which the appeal relates but also encompasses the paddock immediately to the south. The appellant has not provided a copy of that planning application or the formal decision made by the Council, but I understand that the development proposed was the conversion of stables into ancillary residential accommodation. The appellant does not indicate whether that permission was implemented or not.
19. Three points flow from this. Firstly, from the limited information available to me, it appears that the planning permission granted was for the conversion of *stables* to ancillary residential accommodation (my emphasis). There is no indication in the description of development provided by the appellant that the planning application sought permission for the change of use of the surrounding land or that planning permission was granted for any such change of use.
20. Secondly, the location plan submitted with that application covers both the appeal site and the paddock. Logically, if the appellant is correct in his assertion that the 1999 permission grants planning permission for use of the land as ancillary residential accommodation, that would apply equally to the paddock and the land subject to this appeal. However, it is no part of the appellant's case that this permission granted planning permission for use of the paddock as ancillary residential accommodation. The appellant does not explain why it is considered that the 1999 permission applies to the land subject this appeal but not to the adjoining paddock.
21. Finally, even if the appellant's interpretation of the 1999 permission was correct, none of the above would be relevant unless the planning permission was correctly implemented. I have no information to show that this was the case.

#### *Land Registry documents*

22. The Land Registry document provided by the appellant dates from May 2003 and comprises a Title Plan based on an Ordnance Survey extract. The Title

Plan depicts a larger area of land than just the appeal site<sup>1</sup>. The land (presumably that to which the Title Deeds relate) is shown divided into three parcels shaded, respectively, in blue, red and yellow. The yellow shaded area extends down the full length the west side of the site. The blue shaded area is in two parts. The first part covers the north-east corner of the site, and includes the main dwelling. The second part comprises a small strip on the southern boundary of east half of the site. In between the two parts shaded blue as broadly square-shaped parcel of land shaded in red. There is no indication on the Title Plan itself as to what these three colours signify, and the appellant has not provided the associated Title Deeds or any other parts of the Land Registry document.

23. The Land Registry document is provided as Appendix B to the appellant's Appeal Statement. At the top of this appendix is a typed note in quotation marks to the effect that the yellow tint on Title Plan is no longer of any significance and should be ignored on the basis that the entry in the register to which this reference relates has been cancelled. This leads the appellant to assume that the land is left to fall within the residential curtilage of Oakmead Farm. This typed note is clearly not part of the original Title Plan document but, beyond stating that comes from the Land Registry document of May 2003, the appellant does not explain the origin of the typed note.
24. My difficulty with this piece of evidence is that the Title Plan, and the assumption that the appellant draws from it, are not supported by providing the remainder of the Title Deeds. It is usual in that type of document for the purpose and/or significance of any colours or shading on the Title Plan to be explained. Similarly, the Title Deeds usually explain when that colour(s) or shading no longer apply and the reasons behind that.
25. In the absence of a full copy of the Title Deeds, I am unable to ascertain the meaning of the blue, red and yellow shading on the Title Plan. Neither I am able to assess whether the conclusion drawn by the appellant that the land falls within the curtilage of Oakmead Farm has any credence. Similarly, not having had sight of the full Title Deeds, I cannot discount the possibility that there is information in that document that weighs against the appellant. Consequently, in the absence of a copy of the full Title Deeds, I attached very little weight to this piece of evidence and the conclusion drawn from it by the appellant.
26. There is a further typed note in Appendix B below the Land Registry extract which purports that this entry clearly shows that the land would now fall within the residential curtilage of the Oakmead Farm. Two points flow from this. Even if the appellant is correct in claiming that the yellow shaded area can be regarded as forming the curtilage of main dwelling, that yellow shaded extends beyond the appeal site and into the paddock immediately to the south. It is again no part of the appellant's case that the paddock should be regarded as ancillary residential accommodation to the main dwelling, and no explanation is given as to why the assumption made by the appellant in relation to the yellow shaded area would not apply equally to the paddock. Moreover, as indicated above, the concept of curtilage is not a use of land. The appellant's argument is therefore flawed in both these respects.

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<sup>1</sup> The area of land shown on this document broadly corresponds to the site edged in red on the 1999 permission.

*Aerial photographs*

27. The appellant has provided a series of aerial photographs spanning the period between January 1999 and May 2009. The first general observation to make is that none of these aerial photographs date from within the relevant ten-year period between January 2010 and January 2020, albeit the latter is only shortly before to the relevant period. The Council has also provided a series of aerial photographs. These span the period between 2004 and 2018, including two photographs taken within the relevant ten-year period (2012 and 2018 respectively)
28. It is evident from these photographs that, from at least January 2004, there has been a lawned area immediately to the south of the main dwelling. This lawned area is broadly U-shaped and is delineated in part by vegetation. This lawned area appears consistent in terms of its form and area in all the photographs taken post January 2004. Similarly, the area to the east of the U-shaped area has the general appearance of a domestic garden in all these photographs.
29. There is, however, considerably more variation in the appearance of the area to the west of the main dwelling in these photographs. Although taken outside of the relevant ten-year period, the photographs taken in 2003, 2004, 2005 and 2006 show the area beyond the tennis court and swimming pool to be of similar appearance to the paddock. Similarly, although there is some change in appearance of the area immediately to the west of the tennis courts, the remainder of this area is again of the same appearance as and contiguous with the paddock in the photograph taken in May 2009. There is, I note, some form of demarcation just north of the southern boundary of the appeal site but this appears to be a cut line in the grass rather than a boundary structure.
30. Moreover, not only is the area to the west of the main dwelling of the same appearance as and contiguous with the paddock in these aerial photographs, it is of a different appearance to the garden area to the south of the dwelling. I therefore cannot discount the possibility that these areas are of different appearance in the aerial photographs because the use taking place in these areas was different. I am mindful that these aerial photographs were taken outside of the relevant ten-year period, and therefore do not go directly to the use of the land within that period. Nonetheless, by way of comparison, they are of relevance in seeking to interpret the use of the same land in subsequent photographs that were taken within the relevant ten-year period.
31. The aerial photograph taken in 2012, and therefore within the early part of the relevant ten-year period, again shows the area immediately to the west of the tennis courts to be contiguous with the paddock, with no visible means of demarcation. Again, in this photograph, the area to the west of the main dwelling of a different appearance to the land to south of it, being a slightly darker colour and showing no obvious signs of being manicured.
32. It is not until the aerial photograph taken in 2018 that there is a clear demarcation across the west half of the site between it and the paddock. Moreover, in this photograph, there is an area in the north-west corner of the appeal site that is of a distinctively difference appearance to any other part of the appeal site and which appears to be linked to the paddock by a track. There is nothing in the appellant's evidence to explain what this area is used

for, and I cannot discount the possibility that the use of this land is connected to the paddock rather than being ancillary to the main dwelling.

33. On the basis of these aerial photographs, it appears to me that the demarcation between the paddock and the appeal site took place at some point between 2012 and 2018. Up until that point, it appears from these aerial photographs more likely than not likely that the area of the appeal site to the west of the main dwelling was used in conjunction with the paddock and/or formed part of it. I therefore consider that this series of aerial photographs does not support the appellant's case.

*Other photographs*

34. The appellant has provided a number of photographs that show the appeal site, both in summer and in winter. These photographs show, amongst other things, people exercising on the land, dogs in the garden area, a mowed lawn area and garden furniture in situ.
35. Whilst it is clear that these photographs were taken from various points around the appeal site, none of them are dated. It is reasonable to conclude that these photographs were all taken at some point after the appellant purchased the property in June 2015, such that they point towards use of the land for purposes ancillary to the main dwelling from that time. However, because the appellant only took up occupation of the property approximately half-way through the relevant ten-year period, these photographs provide no evidence to show that the use claimed has taken place continuously over the whole of that period.

*Sales particulars*

36. This evidence comprises a selection of five photographs from a total of sixteen images taken from the sales particulars when the property was offered for sale in 2014. Two of these photographs show the U-shaped area to the south of the dwelling house, and one shows the area around the swimming pool. Another appears to show the shrub area to the east of the main dwelling, whereas the remainder appears to show the south-west boundary.
37. I am mindful that these photographs do not show all areas of the site to which the Lawful Development Certificate relates. Nevertheless, insofar as provided, these photographs do appear to show the land in use ancillary residential purposes to the main dwelling at that time.

*Other evidence*

38. In a representation dated 30 September 2020, Ockham Parish Council confirms that it is unable to confirm that the appeal site has been used as part of the residential curtilage of Oakmead Farm for more than ten years from the date of the application. The Parish Council does not go on to explain the extent of its involvement in the appeal site over that period or on what basis it arrived at the position expressed in its representation.
39. In other circumstances and viewed in isolation, this lack of detail might have led me to attach only limited weight to this evidence. However, in this case, the evidence of the Parish Council is entirely consistent with the aerial photographs taken in 2009 and 2012 and is corroborated by those photographs. This leads me to attach significant weight to this evidence.

## Conclusion

40. The Statutory Declaration provided by Mr Allen, the various photographs provided by him showing use of the land and the sales particulars all point towards the appeal site being used for purposes ancillary to the main dwelling since around 2014.
41. However, the aerial photograph taken in 2018 casts an element of doubt over this use across the whole of the appeal site. That photograph shows an area in the north-west corner of the appeal site that is of a distinctively difference appearance to the remainder of the site and which appears to be linked to the paddock. The appellant has not explained why that part of the site is of a different appearance to the remainder. I acknowledge that this land could still have been being used for purposes ancillary to the main dwelling at the time the photograph was taken. Similarly, the difference in appearance could be result of a temporary activity or works. But equally the difference in appearance could be the result of a use not connected to the main dwelling. Consequently, in the absence of any explanation from the appellant, I am unable to conclude that the whole of the appeal site has been used for purposes ancillary to the main dwelling use since 2014.
42. The use of appeal site before 2014 is more clear-cut. It is evident from the aerial photographs that the area immediately to the south of the main dwelling has been used a domestic garden associated with the residential occupation of Oakmead Farm throughout the entire ten-year period and for some time before that.
43. However, in my judgement, the aerial photograph taken in 2009 (and therefore just before the start of the relevant ten-year period) and that taken in 2012 (within the early part of relevant ten-year period) clearly show that the area immediately to the west of the tennis courts is of the same appearance as and is contiguous with the paddock. This leads me to the conclusion that, more likely than not, the use of this part of the appeal site was more associated with the paddock than with the main dwelling, or indeed possibly formed part of it.
44. The joint Statutory Declaration provided by Mr and Ms Attard suggests that this land has formed part of garden of the appellant and the previous owners since 2000. Whilst I have had regard to this evidence, for the reasons given above I prefer the evidence provided by the aerial photographs. The latter are also consistent with the evidence of Ockham Parish Council. On that basis, I find that, on the balance of probability, the area immediately to the west of the tennis courts was not used for residential purposes ancillary to the main dwelling prior to 2012.
45. In summary, this is not a situation where the local planning authority has no evidence of its own to contradict that of the appellant or make his version of events less than probable. On the contrary, I find that the appellant's evidence is not sufficiently precise to counter the photographic evidence produced by the Council and the written evidence of the Parish Council, such that the appellant has not discharged the burden that falls upon him. I conclude that, on the balance of probability, the whole of the appeal site has not been used for residential purposes ancillary to the main dwelling known as Oakmead Farm continuously for a period of ten years beginning from the date of the application. It follows that the appeal cannot succeed on the terms originally submitted.

46. Section 193(4) of the 1990 Act provides that an LDC may be issued under s191 for the whole or part of the land specified in the application. Having found that an LDC should not be granted in relation to the whole of the appeal site, it is therefore necessary for me to consider whether an LDC could be granted for a smaller area than that applied for.
47. It appears to me that, on the balance of probability, it is likely that an area of land to the south of Oakmead Farm could be regarded as having been in residential use for purposes ancillary to the main dwelling continuously for a period of ten years beginning from the date of the application. In other circumstances, I might have been prepared to issue an LDC for that part of the site.
48. However, from the appeal documents that are before me, I understand that there is an ancillary residential unit known as 'The Cottage' to the north of the main dwelling. I have been provided with no details of that dwelling, either in terms of its location or any land associated with it. In addition, there is a degree of uncertainty over the area in the north-west corner of the appeal site which, on the face of it, appears at some point in time to have been linked to the paddock rather than the main dwelling. In the absence of information relating to these areas of land, I am not in a position to specify with sufficient precision the land which may properly be considered as having been used for residential purposes ancillary to the main dwelling known as Oakmead Farm. It follows that I am not able to issue an LDC for part of the appeal site.
49. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of use of land for ancillary residential purposes to the main dwelling was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

### **Formal Decision**

50. The appeal is dismissed.

*Paul Freer*

INSPECTOR